No. 13051

United States
COURT OF APPEALS
for the Ninth Circuit

OREGON-WASHINGTON BRIDGE COMPANY,
Appellant,

vs.

TUG "LEW RUSSELL, SR.," and CRANE BARGE No. 25, RUSSELL FAMILY, INC., RUSSELL TOWBOAT AND MOORAGE COMPANY,
Appellees.

BRIEF OF APPELLANT OREGON-WASHINGTON BRIDGE COMPANY, a Corporation.

Upon Appeal from the District Court of the United States for the District of Oregon.

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STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 10-51

SUBJECT INDEX

TABLE OF CASES

TABLE OF CASES (Cont.)

TEXTS

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JURISDICTION

This is an appeal from a final decree entered by the District Court in a cause in admiralty. Therefore this Court has jurisdiction of the appeal.

STATEMENT OF THE CASE

Appellant, Oregon-Washington Bridge Company, is appealing from the judgment of the Trial Court, denying it recovery for damages sustained when its Hood River-White Salmon highway bridge across the Columbia River at Hood River, Oregon, was struck by the end of a boom on Crane Barge No. 25 propelled by the Tug "Lew Russell, Sr.," owned by Russell Towboat and Moorage Company. The crane barge and crane were owned by Russell Family, Inc. This owner intervened and made claim against appellant because of damage to the crane barge and the crane. The Trial Court allowed appellee, Russell Family, Inc., a judgment of $3,306.11 against appellant. Appellant has appealed from said final decree made and entered March 5, 1951.

The Hood River-White Salmon Bridge was opened for traffic in December, 1924. It was designed, built and operated under the supervision of E. M. Chandler who is president of the Oregon-Washington Bridge Company and has been its engineer in charge of the bridge ever since it was started.

Originally it had no lift span but when the dam was put across the Columbia River at Bonneville, the level of the water was raised to such extent that it became necessary or desirable to have a lift span, which was completed in April, 1940. Libelant's Exhibit No. 14 shows the bridge after the lift span had been added.

The lift span is about 262 feet long. The center of the lift span is theoretically the boundary line between

the State of Oregon and the State of Washington and was the center of the thread of the current at the time the bridge was built. In the center of the lift span is a toll house. Just north of the lift span and about 25 feet above the roadway is what is called the control house or operator's house. Mr. Chandler marked this with a letter "X" on libelant's Exhibit No. 14 (Ap. 176).

In designing the lift span, which was done in conjunction with the War Department and paid for by the Federal Government, a light was installed in the center of the lift span so that when the span starts to lift the light goes on automatically and remains red. When the lift span reaches the top the light turns green. The witness Harold Benson estimated the diameter of this light at about 8 or 10 inches (Ap. 128). Mr. Chandler said it reflects quite a bright light—much brighter than the traffic control lights at street intersections. An air whistle operated by a motor was installed on the bridge in accordance with the plans worked out in conjunction with the War Department.

An excerpt from part 203, Bridge Regulations adopted pursuant to the provisions of section 5 of the Rivers and Harbors Act, August 18, 1894, was admitted in evidence as libelant's Exhibit No. 16. This regulation provides among other things that the authorized representative of the owner of the bridge shall arrange for the prompt opening of the draw upon signal at the time specified in the notice for passage of the vessel. It is expressly provided that the call for the opening of the draw shall be one long, two short and one long blast as a signal for the opening of the draw.

The evidence shows that in the evening of June 12, 1950, someone who was not identified at the trial, called the representatives of the owner of the Hood River-White Salmon Highway Bridge at Hood River, Oregon, and stated that some vessel which was unable to pass under the closed bridge desired to pass through the draw and would be there for that purpose at about 8:30 A.M., June 13. Mr. O. H. Adams, an employee of the bridge company, was on duty at 8:30 A.M. on June 13. The equipment did not show up at this time, but sometime around 11:30 A.M. he identified what he assumed to be this equipment approaching from the downstream or westerly side of the bridge. Mr. Adams thereupon called Harold Benson, an electrician, who came to the bridge to stand by and to assist Mr. Adams in opening the span for the oncoming equipment. Mr. Adams had worked on the Hood River-White Salmon Bridge for a couple of years and Mr. Benson had served in a stand-by capacity for a number of years and at all times when he was available had been called to stand by or participate whenever the lift span of the bridge was raised for the passage of river traffic.

Although the signal required by libelant's Exhibit No. 16 was not given, Mr. Adams assumed that the approaching craft was that of which advance notice had been given in the evening of June 12. Mr. Adams and Mr. Benson proceeded to open the draw of the bridge. However, when it had been raised about 13½ feet, it stopped because of a power failure at the P.U.D. which supplied the power for raising and lowering this span. It was, in effect, admitted at the trial that libelant had

made proper inspections of the lift span and there was no showing of any negligence on the part of libelant in connection with the power failure or the inability to raise the lift span higher (Ap. 41, 186). It was admitted at the trial that the only cause of the accident was the power failure (Ap. 186). In the Trial Court's findings (Ap. 41) the Trial Judge said he did not find the bridge was negligent by reason of the fact that a power failure prevented it from raising the span higher, but the Trial Judge did express the opinion that the bridge was negligent in not maintaining an auxiliary whistle or some other signaling device not dependent upon the bridge's power lines which could be used in the event of a power failure or other emergency.

As soon as it was discovered that the power had failed, Mr. Adams rushed out of the control tower where he and Mr. Benson had been working onto the southerly end of a platform which went around the west, north and east sides of the control tower and which extended southerly from the easterly end of the control tower. In this position Mr. Adams waved his hat and shouted to the oncoming craft and its operators. The whistle could not be blown because it was operated by the same power which had failed.

The tug had a crew of four persons. Only one of these persons was on duty, however, as the tug and its tow approached the Hood River-White Salmon Bridge. One other member of the crew had left his quarters shortly before the impact and said he was standing on the "Texas" deck of the tug, portside, approximately eight or nine feet below the pilot house.

As the Tug "Lew Russell, Sr." approached the Hood River-White Salmon Bridge, it was pushing a barge in front of it which had about four or five inches freeboard (Ap. 264). Crane Barge No. 25, a converted L.S.M. type steel hull vessel, approximately 200 feet long and a 34 foot beam without propulsion machinery, was being pushed forward and to the starboard of the Tug "Lew Russell, Sr." The combined length of the tug and tow was about 265 feet (Ap. 232). A crane was bolted to the deck of the barge about half-way between the middle of the barge and the stern and from its base a long boom extended upward and forward under which was loaded a small L.C.M. called the "Laura Louise". We could not get the pilot of the tug to state how high the end of the boom was above the level of the water (Ap. 244, 245), but he testified that the top of the boom came within three feet of clearing the bridge (Ap. 231). Some of the photographs marked as libelant's Exhibits 1 through 11 show the boom in the position it was immediately after the accident. According to the pilot the boom was about 110 feet long (Ap. 230).

Witnesses for respondents testified that some one-quarter of a mile downstream from the bridge the engines on the tug were cut off and that the momentum of the tug and its tow decreased from four miles per hour to some one-half mile per hour. Appellant's witnesses testified that they saw no indication of any stopping or decreasing the speed of the oncoming tug and tow.

In any event the tug and its tow did proceed forward without any affirmative signal from the bridge or

without giving any affirmative signal on its own account. The pilot of the tug, who was the only one on duty, was in the pilot house and some twenty-five feet above the level of the water. He claims that it was difficult for him in his position to estimate the relative height of the draw span and the top of the boom. He testified that the tip of the boom was approximately ten or fifteen feet, fifteen feet at the most from the bridge when he saw there was danger and reversed his engines (Ap. 233).

The lower member of the draw span was struck just north of center by the boom a few feet beneath its extreme top. The boom carried on through the bridge. It was necessary to put the bridge on limited use for a period of thirty-one days while temporary repairs were made. The uncontradicted testimony shows that appellant sustained damages exceeding the $30,621.18 alleged in its libel.

We submit the evidence clearly shows that respondents failed to maintain a proper lookout and did not keep the tug and tow under control but were proceeding at a speed such that they could not stop or otherwise maneuver the tug and tow and that this negligence is the proximate cause of the accident and the damages incurred and that appellant should recover full damages. Even though this Court should agree with the conclusion of law reached by the Trial Court that appellant should have had some auxiliary signal device, appellant would in any event be entitled to contribution from the tug and its operator and the damages should be divided between appellant and respondent, Russell Towboat and Moorage Company.

ASSIGNMENTS OF ERROR

Appellant's Assignments of Error are set forth in the Apostles pages 48 through 51. Said Assignments of Error are for the convenience of the Court attached to this brief as an appendix. We desire to present the following

POINTS ON APPEAL

I.

This being an appeal in admiralty it will be tried de novo. The SS Bellatrix, 114 F. (2d) 1004; City of Cleveland vs. McIver, 109 F. (2d) 69.

ARGUMENT

We recognize that this Court will give great weight to the findings of fact made by the Trial Judge. However, this being an appeal in admiralty this Court is entitled and required to consider the matter de novo and the Court is not bound by conclusions of law made by the Trial Court even though these conclusions of law are designated findings of fact. For example, we understand this Court would have to give great weight to the finding of the Trial Court that there had been power failures on at least three occasions prior to June 13, 1950 (Ap. 39) even though the only specific testimony on this point so far as we can recall is that of the witness Benson who said there had been power failures on two occasions that he could remember (Ap. 137). We do not understand that this Court is bound by the findings

of the Trial Court when they are so clearly wrong. The only criticism of appellant made by the Trial Court and the only finding of fact made by the Trial Court which in any way can serve as a basis of liability on the part of appellant is that appellant did not have any auxiliary whistle or other emergency signal of any kind on the bridge which could be operated in the event of a power failure. It is a fact that there was no auxiliary whistle, but whether or not appellant was in duty bound to maintain or provide an auxiliary whistle or other emergency signal is a question of law and not a question of fact and any conclusion reached in this regard by the Trial Court would be a conclusion of law rather than a finding of fact and therefore would not be binding upon this Court.

We think the distinction is illustrated in New St. L. & Calhoun Packet Corp. v. Pa. R. Co., 194 S.W. (2d) 977, 982, 302 Ky. 693. The court said:

> " * * * The general rule is that while determination of the degree of care is one for the court (272 Ky. 339, 114 S.W. (2nd) 89) whether care was exercised in discharge of a duty, is generally a question for the jury. Jones v. Sharp's, Administrator, 282 Ky. 638, 139 S.W. (2nd) 731."

In our case there is no question in fact as to what the operators of the bridge did and how they did it. There is no contradiction to the testimony that as soon as it was discovered that the power had failed and that the whistle would not blow, Mr. Adams rushed out onto the southerly end of the platform around the control tower and there signalled and shouted to the oncoming

tug and tow. Whether there was any responsibility on the part of appellant to provide other means of warning is a question of law and involves a determination of the degree of care which is a question of law for the Court to decide and not a question of fact to be determined by the trier of the facts.

POINTS ON APPEAL

II.

There is no showing that lack of auxiliary whistle or other emergency signal in any way contributed to the accident and the damages complained of.

ARGUMENT

The Trial Court found that the tug and tow came to a stop more than a quarter of a mile below the bridge (Ap. 38). The testimony of the pilot of the tug shows that the equipment did not come to a complete stop but that its speed was reduced to about one-half mile per hour (Ap. 248). Thereupon, and without giving any signal and without receiving any signal from the bridge, the pilot testified that he saw the lift span had come to a halt. He then started his engines and resumed progress toward the bridge with his engines turning over about 400 revolutions per minute, building up a speed to about one and one-half miles per hour (Ap. 248). Thereafter, and without any lookout other than that which he himself could maintain from his position in the pilot house and with his eyes fixed on the end of the boom in an attempt to determine whether or not the boom

would pass under the lift span, he proceeded toward the bridge and the point of impact. In the meantime and as soon as it was determined that there was no power to operate the whistle, Mr. Adams rushed out on the platform extending southerly from the southeastern corner of the control tower. From this point he waved his hat and hollered at the oncoming tug and tow. It is true that there was a bridge member fourteen inches square in the western edge of the bridge slightly south of the point from which Mr. Adams was attempting to signal the approaching tug and its tow. There was also a diagonal member which extended from this upright member in a northerly direction. Other than this there was no obstruction to the view. Libelant's Exhibit No. 14 shows the location of the various bridge members.

The testimony shows that the lift span is over 260 feet long. The pilot testified that from a point one-quarter of a mile downstream he moved forward toward the center of the lift span without changing his course and apparently without making any observation other than to watch the end of the boom to see whether or not it would clear the lift span. It is very obvious that for a considerable distance prior to the point of impact, Mr. Adams must have been full view of the pilot on the tug if he had looked.

Mr. Adams also testified that there was a strong wind blowing upstream. He testified that he shouted in an attempted to attract the attention of the pilot. What is there in the record to indicate that the pilot on the tug would have heard any auxiliary whistle that could

have been used by libelant or that he could have heard any whistle. Mr. Chandler, Mr. Adams and Mr. Benson all testified that without exception whistles had been blown, signalling craft when the lift span was in position for the craft to pass through. Appellee's witnesses testified that they had been through the bridge on two or more occasions prior to June 13, 1950 when the lift span was raised and that they had never heard a whistle. How, then, can it be contended that the pilot alone in the pilot house would have heard an emergency whistle had one been blown?

At the trial considerable point was made by proctors for appellees that there was no significance in the whistles habitually blown by appellant to advise river craft when the draw was sufficiently raised because there was no provision for such whistles in the Army regulations relating to the bridge. Likewise, there is no provision in said regulations requiring emergency or auxiliary signals or whistles. Even if there had been emergency signals or auxiliary whistles and these had been used to the knowledge of the tug pilot, what do we have to show that said pilot would have properly interpreted these signals or whistles? His own testimony shows that he was so intent on watching the top of the boom and its relation to the lift span that he was practically oblivious to all other conditions and considerations.

The testimony shows that there was a red light in the middle of the lift span which had a red reflector and which Mr. Chandler describes as being bigger and more

easily seen than ordinary traffic signals. The operator of the tug and tow said he did not see this light. He said he was looking straight ahead, and was watching the end of the boom which was directed almost at the middle of the lift span. The contact was made immediately north of the middle of this lift span. It must be remembered that this light was never seen by the tug operator. If he could not see this red light directly in the middle of the lift span to which he testified he was directing his attention and which he claims he could see vividly enough to determine when it had come to rest, then how could he see any emergency signal which reasonably could be required of appellant? A very short time elapsed from the moment it was discovered by the bridge tender that the power had failed to the moment of impact. It would seem to us to be the utmost conjecture and speculation to try to determine whether or not more effective warning could have been given.

We submit the evidence requires the conclusion that the operator of the tug would not have seen a flag regardless of the fact that a whistle had been blown or a flag had been waved.

Mr. Lew Russell, Sr., president of Russell Towboat and Moorage Company, and secretary and manager of Russell Family, Inc., called as a witness on behalf of appellees, testified that he had gone through the bridge when the lift span was raised on about three occasions prior to June 13, 1950. He testified he had never noticed a red light in the day time. When asked how far he could see red traffic lights in the day time, he an-

swered "From twenty-five feet away" (Ap. 279). If this fairly represents the ability of appellees and their personnel to see danger signals, then we respectfully submit that it would have been impossible for appellant to have provided emergency or auxiliary signals or whistles which would have protected appellees and the operators of their river craft.

The record shows that the Trial Court was not much impressed with the importance of the red light and indicated a reluctance to attach much significance to the red light shining in the day time. We are willing to submit our case on the proposition that the Court can vividly distinguish a red street traffic signal in the day time with the sun shining for a distance in excess of one-quarter mile. Inasmuch as the tug operator did not see this light at any time and inasmuch as the light was centered in that part of the bridge span toward which he was moving, it seems clear to us that the operator would not have seen any reasonable signal or flag that could have been used by or required of appellant. It is not to be wondered that he did not see Mr. Adams who was waving his hat from a point some 130 feet northerly of the course which the tug was pursuing. It is uncontroverted that Mr. Adams could see the pilot and that there was no obstruction which kept Mr. Adams from seeing the pilot. By the same token the pilot should have seen Adams if he had been watching.

The Trial Court erred in concluding that reasonable prudence required some emergency signal or auxiliary whistle on the bridge. It must be remembered that very

few craft moving under the bridge required the lift span to be raised. For example, Mr. Lew Russell, Jr. testified that he had made many hundreds of trips underneath the bridge and that on approximately three occasions it was necessary to lift the span (Ap. 278). Thus the situation differs from the City of Portland where craft are moving back and forth constantly and where the bridges are required to be opened several times each day. In order to be free from negligence one is only required to exercise due care in the light of all the facts and circumstances. Much more might be required of a bridge operator in the City of Portland than would be required of a bridge operator at Hood River where traffic conditions are altogether different. There was no statute or regulation requiring auxiliary whistles or emergency signals. There is nothing in the record to indicate that an ordinarily prudent person in the same position as was appellant would have done anything other than that done by appellant. The record fails to show that any reasonable auxiliary whistle or emergency signal would have been observed or comprehended by appellees' representatives.

POINTS ON APPEAL

III.

Appellees rely on the proposition that in the absence of proper warning a vessel approaching a bridge over navigable waters has the right to assume that the bridge will be timely opened for traffic.

ARGUMENT

In support of this proposition counsel relies, among others, upon Cement v. Metropolitan West Side El. Ry. Co., 123 F. 271, which is a widely cited decision. In this case we note the court points out that the ship was manned by a capable captain as master in a proper position in the pilot house and it had on watch a first mate and a mariner. It should be noted that even in this case, p. 273, the court said:

> "A vessel, *having given proper signal* to open the bridge and *prudently proceeding* under slow speed, has, in the absence of proper warning, the right to assume that the bridge will be timely opened for passage." (Emphasis ours)

In the statement of facts it was pointed out that the master saw that the bridge was not opening when he was from 125 to 135 feet away from the bridge and when he was passing through another bridge. He had given timely signal. In our case the approaching tug gave no signal; it had not waited for any affirmative sign from the bridge or its operators that it was in readiness to permit the passage of the tug and tow. The tug was not manned by a captain in a proper position to observe whether or not the bridge was sufficiently opened. It had no one on lookout. It was not proceeding prudently. Appellees did not bring themselves within the rule announced by the Cement case and the other cases in which the decision has been cited.

Almost without exception there are facts and circumstances pointed out in the various cases cited by counsel for appellees which distinguish those cases from

the one under consideration. For example, the SS Bellatrix, 114 F. (2d) 1004, 1006, says:

> "A ship may, therefore, proceed on her course toward a drawbridge upon the assumption that the draw will be opened timely, especially where, as in the present case, the ship signals punctually for the opening and is answered affirmatively by the draw tender."

If the operators of the Hood River-White Salmon Bridge had given some affirmative signal to the tug signifying the readiness of the bridge to admit the passage of the tug and thereafter had failed to have the way clear, we would have a situation comparable to that considered by the court in the Bellatrix case, 114 F. (2d) 1004.

Inasmuch as it is admitted that the lift span stopped at thirteen and one-half feet through no fault or neglect on the part of appellant, it would seem that the ruling in Newton Creek Towing Co. v. City of New York, 49 F. (2d) 475, is more nearly in point than are the cases relied upon by counsel for appellees. In the Newton Creek Towing Co. case where a key in a gear on a shaft broke without any way for the bridge operator to be warned of the break, the court held that the City was not negligent. At p. 476 the court said:

> "The authorities cited by libelant are quite remote in point of facts involved, and do not aid in the disposition of this cause."

Among the cases cited by libelant in the Newton Creek Towing Co. case is Cement v. Metropolitan West Side El. Ry. Co., 123 F. 271, and this is one of the cases which the court in the Newton Creek Towing Co. case

refused to follow. Likewise, it should not be followed in our case.

In City of Chicago v. Wisconsin SS Co., 97 F. 107, 110, 111, it was shown that a lock was provided at one end of the draw of a bridge. It was contended that it should have had a lock at each end. This is somewhat like the contention of appellees in our case that the bridge should have emergency signaling devices. The court said:

> "We think the city cannot be charged with negligence in failing to have a lock at both ends of the bridge, though that probably would have lent additional safety. The object of the lock is merely to hold the bridge in position over the center protection, and not to resist the impact of a moving vessel * * *. While such additional lock might have increased its resisting power, it is merely a matter of conjecture whether it would have been sufficient to prevent a collision. There is no allegation in the libel upon the subject. The duty of the city in that regard was not to supply every possible protection, but only such as experience shows to be necessary in the usual use of the bridge."

Likewise, appellant in our case does not have the duty of supplying every possible protection but only such as experience shows necessary in the usual use of the bridge. On no other occasion during the entire life of the lift span had any difficulty been experienced in raising the said lift span. On no other occasion had the whistle provided for signaling purposes failed to work. Paraphrasing the language in the use by the court in the City of Chicago case, while such additional signaling device might have increased the ability of the bridge

operator to give warning, it is merely a matter of conjecture whether any additional signaling device would have been sufficient to prevent a collision. In fact, the almost overwhelming weight of the testimony is to the contrary. As we have pointed out, the tug operators had never heard the whistle in the past; they did not hear Mr. Adams shouting on the day of the accident; they did not see him waving his hat.

In Conners Marine Co. v. New York and Long Branch R. Co., 87 F. Supp. 132, 134, the court says:

> "Furthermore, it would seem logical that where a moving vessel collides with a drawbridge, there is a presumption of negligence on the part of the vessel."

In New St. L. & Calhoun Packet Corp. v. Pa. R. Co., 194 S.W. (2d) 977, 982, 302 Ky. 693, in considering the responsibility of the railway company for a breakdown of its bridge, the court said that the railway company, defendant, was only obliged to use ordinary care in the maintenance and inspection of its bridge span.

It must be remembered that it is only after a vessel has given proper signal to open the bridge and is prudently proceeding under slow speed that it has in the absence of proper warning the right to assume that a bridge will be timely opened for its passage. In our case no signal of any kind had been given, although one is expressly required by the Army regulations in effect at the time the accident happened. The tug was not proceeding at a sufficiently slow speed under the circumstances and it certainly was not prudently proceeding inasmuch as it had no proper lookout.

POINTS ON APPEAL

IV.

It is a primary rule of navigation that all moving vessels shall maintain a careful and efficient lookout. The failure of appellees to maintain a proper lookout was the direct and proximate cause of the accident and the damages complained of.

ARGUMENT

In Dahlmer v. Bay State Dredging & Contracting Co., 26 F. (2d) 603, 605, where the Orion, a moving vessel, collided with moored scows, the court said:

> "But, even if it were held that the scows were improperly moored, such fact alone would not bar a recovery, if the collision could have been averted by the exercise of reasonable diligence on the part of those in charge of the Orion."

Further on at p. 605 the court says:

> "It is a primary rule of navigation that all moving vessels shall maintain a careful and efficient lookout. The lookout is 'both eyes and ears of the ship'; he must be properly stationed on the forward part of the vessel and must be held to a high degree of vigilance in that position. Neither the captain nor the helmsman in the pilot house can be considered to be 'lookouts' within the meaning of the maritime law."

The Ariadne, 13 Wall 475, 478, 20 L. Ed. 205, one of the cases cited, points out the importance of a lookout.

The Genessee Chief, 53 U.S. 443, 462, 13 L. Ed. 1058, is also cited by the court in support of its ruling in 26

F. (2d) at 605 and while the court was there considering a collision between two vessels, the reasoning of the court would seem equally appropriate to a situation where the operator of the Tug "Lew Russell, Sr." testified that he was in a position where he could not readily or accurately determine how high the lift span had been raised or whether or not the boom would pass under it.

The Oregon, 158 U.S. 186, 193, 15 S. Ct. 804, 39 L. Ed. 943, is another case cited in 26 F. (2d) at 605. This decision grew out of a collision between the moving Oregon and the anchored Clan Mackenzie. The libel charged the Oregon with fault in not having a proper lookout or a competent pilot and in failing to keep out of the way of the Clan Mackenzie.

The charterer of the Oregon cross-libeled charging fault of the Clan Mackenzie in failing to display a proper anchor light, to keep a proper anchor watch, or to call the steamer's attention by shouting, ringing the ship's bell or showing a lantern or torch.

On p. 197 the court stresses the fact that the lookout on the Clan Mackenzie repeatedly hailed the steamer.

On p. 202 the court considers the claim made for the Oregon that those on the Clan Mackenzie should have done something in addition to that which had been done. It then points out that inasmuch as the Clan Mackenzie did in fact hail the steamer, the Oregon was forced to abandon this position. On p. 203 the court said:

> "If the courts were at liberty to add to the requirements of the statute, it would always be

claimed that the signal added was not the proper signal that should have been used."

While in The Oregon it was shown that the regulation light had been displayed on the Clan Mackenzie it was contended by The Oregon that such light was misunderstood as in our case the operator of the tug claims he was misled by the draw having come to rest. In our case there is no statute or regulation requiring a light or other signal, but in fact the bridge did have a light and a whistle. The light was red for oncoming traffic and at no time turned green. It was never seen by the tug operators. The whistle could not be blown because of conditions beyond the control of the bridge and the bridge operators and without any fault on the part of the bridge operators. They gave prompt warning by signaling and by hailing the tug. If the court is going to say that they should have had an auxiliary whistle or a flag, the reasoning of the Supreme Court in The Oregon is pertinent for the tug operator and the witness each claimed that he had gone through the bridge with the draw lifted on two or three occasions and that neither of them had ever heard a whistle, though the testimony of libelant's witnesses shows that in fact the whistle uniformly had been blown on all occasions when the bridge was in readiness for the passage of river craft after the draw had been raised. Regardless of the type of flag that was used by libelant it could always be contended that some other type should have been used or that it should have been exhibited from some other position.

At the time of the accident there was no requirement by statute, regulation or otherwise that a whistle should be blown or a flag should be shown on the bridge. The cases relied upon by appellees are not in point, for without exception, they deal with situations where the moving craft had given a whistle or signal required by statute or regulation and had either received an answering signal or where circumstances have been pointed out which the court held justified the ship's operator in moving forward without waiting for the answering signal. In our case the signal required by regulation was not given by the tug and no answering signal was given by the bridge. Everyone admitted the day was clear and visibility good. If someone had been keeping lookout at a point where he could have seen effectively, the accident could easily have been avoided.

If the tug operator saw fit to assume that the bridge was in readiness when admittedly he was in no position to determine the height of the draw in relation to the top of the boom, his principal is responsible for his erroneous assumption. According to his own testimony there were three other men on the tug. One of these men was supposed to be on duty with him. He saw fit to advance on the bridge without any lookout and without even knowing where his deckhand was.

If the tug operator could see only as poorly as he claimed, how could he determine from one-quarter mile distance that the lift span had come to rest? What have we in the record to show that any emergency equipment could have been put in operation were such available

between the time it was learned that the bridge could not be opened and the time the tug and tow were so close to the bridge that they could not be stopped.

In The Oregon at p. 204 the court points out that it takes time to obtain and use emergency equipment. As the court said in The Oregon case as soon as the bridge tender learned that the power had failed, he did that which in the excitement of the moment, seemed to him best. On p. 204 of The Oregon decision it is said that while it is possible that a bell might have called the attention of the approaching steamer, it is by no means certain that it would have done so and whether or not the lookout acted wisely he evidently used his best judgment which is all he was required to do under the circumstances. So, in our case. The court continues that it was not prepared to say that a hail could not have been heard as far as a bell, and considering the character of the lookout that was kept on The Oregon, it is very doubtful whether a bell would have been heard or regarded. In our case only the pilot was on lookout. He admittedly was in a poor place to see. He had never heard whistles from the bridge on other occasions. How can it be assumed that he would have heard or regarded any reasonable signal or whistle that the bridge could give by emergency equipment? Obviously if a flag to be manually exhibited had been at any place other than the control tower it could not have been reached in the emergency and could not have been used by the bridge tender.

In The Paris, 37 F. (2d) 734, 739, the court points out the necessity for proper lookouts on moving vessels.

While the ship there involved was a large passenger ship and was moving in the New York harbor, the same reasoning should apply to any moving craft. It would seem particularly applicable to a situation such as ours where a craft was approaching an obstacle to navigation with only one person on duty and he in such place that he could not see accurately and quite probably his hearing was made difficult by the pilot house in which he stood and the noise from the engines. If he wanted to take the chance that the bridge was open, no signal having been given to him by the bridge, he should have had someone forward who would have had the maximum opportunity to observe and hear warnings from the bridge. If such lookout had been kept, we are entitled to assume that the signals given by Mr. Adams would have been observed. Appellees cannot relieve themselves of their obvious failure by seeking to require appellant to provide an emergency sound or flag signal that would have penetrated into the pilot house and into the consciousness of the man who was then and there gambling that he could move his lofty tow under the partly raised bridge and who had his attention riveted on the outcome of his gamble.

In Texas & P. Ry. Co. v. Angola Transfer Co., 18 F. (2d) 18, it was held that a bridge owner was not required to put temporary fenders around caps submerged by extraordinary high water since there was nothing to put the bridge owner on notice that an accident was liable to happen.

The same reasoning can be applied in our case. The evidence shows that there had only been two prior power

failures and there had never been a time when the lift span had failed to operate. The bridge operators had set up a procedure which would have protected the moving craft and have absolutely prevented collision if the craft had only waited until it had received a signal from the bridge before attempting to pass under the draw.

In The Orange, 68 F. (2d) 307, 308, the Circuit Court said it accepts the findings of the trial court but did not agree with its point of law. It modified the decree by holding both vessels at fault and divided damages.

In doing so it pointed out the necessity of having a lookout where he could see. It being admitted in our case that only one man was on duty and he in such position that he could not determine the height of the draw span or whether or not the top of the crane boom would clear, the tug had no proper lookout. Even though this Court should agree with the trial court that there was fault on the part of the bridge operator in not having auxiliary signals and should reach the conclusion that libelant was clearly to blame and therefore look at the tug operator with a friendly eye, still as the appellate court in the 2nd Circuit said 68 F. (2d) at 308, the tug still seems to have been without the necessary lookout and therefore at fault, requiring a division of damages.

In The Koyei Maru, 96 F. (2d) 652 (9th Ct. May 3, 1938), the court points out the importance of lookout and while there was a collision between the moving

Maru and a tug and tow, the reasons for lookout would not be different in our case. It would seem that it was even more obviously negligent that the tug operated by a single pilot, knowingly in a poor place to see and consciously approaching impaired clearance, should fail to have a lookout at the most advantageous location and with nothing on his mind except to keep proper lookout.

On p. 654 the court concluded by quoting:

> " * * * Every doubt as to the performance of the duty, and the effect of non performance, should be resolved against the vessel sought to be inculpated until she vindicates herself by testimony conclusive to the contrary."

In The Perth Amboy, 48 F. (2d) 640, where the tug grounded its tow on a shallow part of the channel, the court applied the rule requiring adequate and proper lookout. In doing so it cited among others Dahlmer v. Bay State Dredging & Contracting Co., 26 F. (2d) 603, and The Oregon, 158 U.S. 186, 15 S. Ct. 804, 39 L. Ed. 943.

On p. 644 the court said the lookout could have been some 90 feet forward and in a better position to make observation which would have enabled the navigator to keep off the shoals. So in our case the crane barge was 200 feet long and it was being pushed ahead of the tug; therefore, a lookout could have been more than 200 feet nearer the bridge than was the pilot.

The pilot said he saw the boom was going to hit the bridge when it was some 10 to 15 feet distant (Ap. 230). The pilot testified that at the time and place and against

the current he could have brought his tow to a standstill in one-half of its length (Ap. 233). The crane barge which was the longest part of the tow was approximately 200 feet long (Ap. 269, 276). The crane barge was forward of the tug and to the right of a loaded gravel barge which was immediately in front of the tug (Ap. 232). Pilot Sadewasser testified that the boom was 110 feet long (Ap. 230). The base of this boom was fastened at a point on the deck of Crane Barge 25 about half way between the center and the stern (Ap. 277). It can thus be seen that if a proper lookout had been stationed on the forward end of Crane Barge 25 he would have been some 200 feet closer to the bridge than was the pilot in the pilot house. We certainly are justified in assuming that instead of seeing that the collision was imminent when the end of the boom was some ten to fifteen feet from the bridge he would have been able to see the danger when the boom was 210 to 215 feet away. If the pilot is correct in saying that he could have stopped the tug and tow within one-half the length of the tow or within 100 feet there would have been ample time for him to have stopped the tug and tow after a proper lookout would have been warned of the danger. If there had been an adequate and proper lookout the accident never would have happened, even if full credit is given to all the testimony offered by witnesses for appellees.

POINTS ON APPEAL

V.

Considering the record most strongly in favor of appellees it is clear that there was at least contributing fault on the part of appellee, Russell Towboat and Moorage Co., and it should be assessed at least one-half of the damages.

ARGUMENT

The evidence seems to show conclusively that the collision and the resulting damage, both to the bridge and the crane barge, were direct and proximately caused by the failure of Russell Towboat and Moorage Co. in the operation of its tug "Lew Russell, Sr." to have a proper lookout and in attempting to proceed through the draw of the bridge without giving any signal and without being given any signal at such speed however slow that said tug and its tow could not be controlled before striking the bridge and causing the damage. Therefore, under well recognized admiralty rules, appellee, Russell Towboat and Moorage Co. should pay its proportionate part of the damages, even though this Court does sustain the Trial Court in its conclusion of law that appellant should have had auxiliary, emergency signaling devices. Griffin on Collision, p. 564; Robinson on Admiralty, p. 853; Steel All Welded Boat Co. v. City of Boston, 18 F. Supp. 421, 422; Conners Marine Co. v. New York & Long Branch R. Co., 87 F. Supp. 132, 135-136; The Marian, 66 F. (2d) 354, 357; The Ariadne, 80 U.S. (13 Wall) 475, 479, 20 L. Ed. 205.

In Pacific Spruce Corp v. City & County of San Francisco, 72 F. (2d) 712, 714, this Court recognized the admiralty doctrine of an equal division of damages in case of a collision between two vessels when both are at fault contributing to the collision but did not apply it.

We, therefore, feel that the very least this Court can do under the record now presented is to divide the damages between appellant and appellee, Russell Towboat and Moorage Co. In calling this rule to the Court's attention, we do not wish to recede from our position that the real, effective, direct and proximate cause of the collision and damage was the negligence as hereinabove pointed out of Russell Towboat and Moorage Co. and its representatives.

CONCLUSION

There being no contradiction to the evidence that appellant was damaged in excess of $30,621.18 as alleged in the libel and the record showing that this damage was directly and proximately caused by the negligence of appellee, Russell Towboat and Moorage Co., appellant should be awarded its damages against appellee, Russell Towboat and Moorage Co., and the claim of appellee, Russell Family, Inc., should be dismissed. In the event this Court finds that there is mutual fault on the part of appellant and appellee, Russell Towboat and Moorage Co., then the entire damage should be divided between said parties in accordance with admiralty practices and procedures.

Respectfully submitted,

H. Lawrence Lister,
Gray & Lister,
1021 Equitable Building,
Proctors for Appellant.

APPENDIX

ASSIGNMENTS OF ERROR

The libelant, Oregon-Washington Bridge Company, hereby assigns error in the proceedings, decrees, orders and decisions of the District Court in the above-entitled action as follows:

First. The District Court erred in failing and refusing to sustain libelant's exceptions and objections to the findings of fact, conclusions of law and decree made by the District Court in this cause on or about the 5th day of March, 1951.

Second. The District Court erred in finding that the tug and tow came to a stop more than a quarter of a mile below the bridge owned and operated by libelant.

Third. The District Court erred in finding that the navigator of the tug rightly and justifiably believed that the bridge tender had raised the bridge high enough to enable the tug and tow to pass through.

Fourth. The District Court erred in finding that it is immaterial that no signal required by the regulations promulgated by the Corps of Engineers was given by the tug in that under the decisions the giving of the signal required by statute is a condition precedent to any assumption on the part of the tug operator that the bridge would be in readiness for his tug and tow to pass through.

Fifth. The District Court erred in finding that there had been power failures on at least three occasions prior

to June 13, 1950, on the ground and for the reason that this finding is not consistent with the evidence.

Sixth. The District Court erred in finding that the line of vision between the tug operator and the bridge tender was obstructed by the steel work of the bridge upon the ground and for the reason that the exhibits in evidence and the testimony demonstrate that the bridge tender was clearly visible to the tug operator for a considerable distance and at least during the last three hundred feet traveled by said tug and tow prior to the impact with the bridge.

Seventh. The District Court erred in finding that the crane barge was damaged as a direct and proximate result of the negligence of libelant and its bridge.

Eighth. The District Court erred in incorporating in the findings of fact the opinion of the court set out in paragraph 6, pages 4 and 5, of the findings of fact.

Ninth. The District Court erred in making conclusions of law based upon the findings of fact and the District Court erred in making its decree based upon said findings of fact and said conclusions.

Tenth. The District Court erred in making its findings of fact, conclusions of law and its decree and each thereof in that each of said findings herein excepted to and the conclusions and decree based thereon are not supported by the evidence, but are contrary to the evidence and the law as applied to said evidence.

Eleventh. The District Court erred in failing and refusing to find that the collision and the resulting dam-

ages were caused by the failure of the tug and its operators to maintain a proper or any lookout, in proceeding at a speed which made it impossible to stop the tug and tow when the operator thereof became aware of the impending collision and in failing to keep the tug and barge under such control that it could have been stopped or otherwise maneuvered so as to have avoided colliding with the libelant's bridge and in failing and neglecting to give the signal required by the regulations and waiting thereafter until some affirmative evidence had been furnished by the bridge or its tenders that the bridge was in readiness for the tug and tow to proceed.

Twelfth. The District Court erred in finding and decreeing that Russell Family, Inc., have and recover from libelant, Oregon-Washington Bridge Company the sum of $3,306.11.

/s/ H. Lawrence Lister,
Gray & Lister,

Proctors for Appellant.

STATEMENT OF POINTS ON APPEAL

1. This being an appeal in admiralty it will be tried de novo.

2. There is no showing that lack of auxiliary whistle or other emergency signal in any way contributed to the accident and the damages complained of.

3. Appellees rely on the proposition that in the absence of proper warning a vessel approaching a bridge over navigable waters has the right to assume that the bridge will be timely opened for traffic.

4. It is a primary rule of navigation that all moving vessels shall maintain a careful and efficient lookout. The failure of appellees to maintain a proper lookout was the direct and proximate cause of the accident and the damages complained of.

5. Considering the record most strongly in favor of appellees it is clear that there was at least contributing fault on the part of appellee, Russell Towboat and Moorage Co., and it should be assessed at least one-half of the damages.